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May 24, 2004

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
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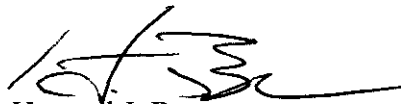
**Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668**

Dear Ms. Dortch,

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its "Statement Regarding Withdrawal of Counterproposal" for submission in the above-referenced matter.

Should any questions arise concerning this matter, please contact this office directly

Respectfully submitted,


Howard J. Barr

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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MAY 24 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments)	MB Docket No. 02-136
FM Broadcast Stations)	RM-10458
Arlington, The Dalles, Moro, Fossil,)	RM-10663
Astoria, Gladstone, Tillamook, Springfield-)	RM-10667
Eugene, Coos Bay, Manzanita and Hermiston,)	RM-10668
Oregon and Covington, Trout Lake, Shoreline,)	
Bellingham, Forks, Hoquiam, Aberdeen, Walla)	
Walla, Kent, College Place, Long Beach, Ilwaco)	
and Trout Lake, Washington)	

To: Chief, Allocations Branch

STATEMENT REGARDING WITHDRAWAL OF COUNTERPROPOSAL

Mercer Island School District ("Mercer Island"), by counsel, submits its Statement regarding the April 26, 2004 Withdrawal of Counterproposal ("Withdrawal") submitted by Mid-Columbia Broadcasting, Inc., First Broadcasting Company, L.P. and Saga Broadcasting, LLC ("Joint Parties). While Mercer Island supports Joint Parties Withdrawal, it opposes reinstatement of the original Covington proposal.

Joint Parties' Withdrawal only proves the point made by Mercer Island at almost the very inception of this proceeding, i.e., that permitting parties to counterpropose their own proposals is in violation of the Administrative Procedures Act and that permitting rulemaking proponents to do so works an unnecessary hardship on the Commission and its staff and imposes an intolerable

burden and works an intolerable unfairness on other parties. The Withdrawal should be granted but the reinstatement request should be denied. The following is shown in support thereof:

I. BACKGROUND.

1. Joint Parties Petition for Rulemaking in this proceeding sought the downgrade of Station KMCQ, Channel 283C, The Dalles, Oregon, to Channel 283C3 and its reallocation to Covington, Washington. Joint Parties also proposed the allotment of Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon and Channel 226A at Trout Lake, Washington in order to accommodate this proposal.¹ Rather than support the proposed reallocation of KMCQ from The Dalles, Oregon to Covington, Washington, the Joint Parties counterproposed their own proposal seeking instead to reallocate the channel to Kent, Washington.

2. In its comments responsive to the *NPRM*, Mercer Island opposed the proposed reallocation to Covington and counterproposed that KMIH(FM) be granted the equivalent of Class A status on its current channel 283 at Mercer Island, Washington and that its license be modified accordingly. Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC ("Counterpetitioners"), through a counterproposal, sought the substitution of Channel 283C2 for Channel 284C2 at Aberdeen, Washington and its reallocation to Shoreline, Washington and the modification of the KDUX-FM license to specify operation on channel 283C2 at Shoreline. To accommodate the allotment at Shoreline, Counterpetitioners requested that Channel 281C be

¹ See *Arlington, The Dalles, and Moro Oregon, and Covington and Trout Lake, Washington (NPRM)*, 17 FCC Rcd 10678 (MB 2002)

substituted for Channel 282C at Bellingham, Washington, and that the license of KAFE(FM) be modified to specify operation on Channel 281C.²

3. The Audio Division issued an *Order to Show Cause*, DA 04-60, released March 12, 2004, directing Saga Broadcasting, LLC ("Saga"), licensee of KAFE(FM), Channel 282C, Bellingham, Washington, to show cause why the license for KAFE(FM) should not be modified as proposed by Counterpetitioners. Saga timely responded on April 26, 2004 seeking to demonstrate why the license for KAFE(FM) should not be modified. On that same date, Joint Parties filed their Withdrawal, withdrawing their counterproposal for Channel 283C2 at Kent, Washington and requesting that the Commission reinstate the original proposal to delete Channel 283C from The Dalles, Oregon and allot Channel 283C3 to Covington, Washington and modify the KMCQ authorization to specify operation on Channel 283C3 at Covington.

II. THE COMMISSION SHOULD DEEM EACH OF JOINT PARTIES PROPOSALS TO HAVE BEEN WITHDRAWN

4 Mercer Island does not oppose Joint Parties withdrawal of the Kent, Washington counterproposal. Mercer Island does, however, oppose the reinstatement of Joint Parties original Covington proposal.³ Joint Parties should not be permitted to reinstate a proposal they voluntarily abandoned simply because it now suits their business goals and interests to pursue that proposal rather than the counterproposal.

5. First, Joint Parties so-called reiteration of the commitment to apply for Channel 283C3 at Covington and to construct such facilities should the proposal be accepted must be

² Joint Parties also proposed that the Commission take this action in order to accommodate the proposed KMCQ relocation from The Dalles, Oregon to Kent, Washington

³ Mercer Island maintains its previously stated position that the Joint Parties counterproposal is defective and that its failure to make a timely expression of interest rendered the original proposal defective as well

rejected. As Mercer Island pointed out in its original Reply Comments in this proceeding, the *NPRM* required Joint Parties not only to comment on the merits of their Covington proposal, but to restate their present intention to apply for Channel 283C3 if allotted and, if authorized, to promptly construct the station.

6. Joint Parties failed on both counts. Joint Parties failed to comment on the merits of their proposal and failed to submit a showing of continuing interest in the proposed Covington allotment. Joint Parties instead counterproposed their own proposal seeking KMCQ's reallocation to Kent rather than Covington. The *NPRM*, however, made no allowance for the submission of a counterproposal by the proponent in lieu of an expression of interest.⁴

7. Not only should the Commission find that Joint Parties failed to make the requisite statement of continuing interest, but it should find their counterproposal to constitute a specific withdrawal of interest in the Covington proposal such that there is no proposal to reinstate. Given Joint Parties (i) failure to satisfy the *NPRM*'s requirements by commenting on their proposal and making the requisite expression of interest and (ii) the withdrawal of the Covington proposal at the time they counterproposed Kent in lieu thereof, the Commission should decline to make any allotment proposed by Joint Parties in this proceeding.⁵

⁴ Joint Parties' counterproposal was not within the scope of the *NPRM* and fails to meet the "logical outgrowth" test "normally applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Arizona Public Service Co v EPA*, 211 F 3d 1280, 1299 (2000), *see also Association of Battery Recyclers, Inc v EPA*, 208 F 3d 1047, 1059 (DC Cir 2000), *First Am Discount Corp v Commodity Futures Trading Comm'n*, 222 F 3d 1008, 1014 (DC Cir 2000)

⁵ The submission of comments by a rulemaking petitioner and the present intention restatement serve as a predicate to any action the Commission might take in the course of this proceeding. *See Murray, Kentucky*, 3 FCC Rcd 3016 (MMB 1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (Allocations Branch 1988) (the Commission's longstanding policy is to refrain from making an allotment to a community absent an expression of interest)

8. None of the cases cited by Joint Parties in support of their request to reinstate the Covington proposal support that action. The facts in both *Wickenburg and Salome, Arizona*, 17 FCC Rcd 7222 (2002) and *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 (2003) differ wildly from the facts of this proceeding.

9. In this case, Joint Parties seek to withdraw their counterproposal nearly two years subsequent to its submission. In that time, the Commission released a public notice regarding the amended proposal,⁶ eliciting numerous comments and reply comments, and four Orders to Show Cause⁷ which also elicited numerous filings. The petitioner in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* withdrew the counterproposal less than two months after its submission. In *Wickenburg and Salome*, the petitioners withdrew their counterproposal **less than a month** after its submission. Moreover, in both of those cases no other party filed an opposition or counterproposal to the initial proposal nor did any party oppose the withdrawal of the counterproposal. In this case, the counterproposals and oppositions are both numerous and significant.

10. Unlike in this case, the petitioner in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, posed a conceivably legitimate reason for its counterproposal. That was not the case of a petitioner, like Joint Parties, that voluntarily, without any unforeseen circumstances and for its own business purposes amended its original proposal. To the contrary, the proponent originally sought to amend its original Oak Grove proposal only because the modification of the station license to Oak Grove would violate the Commission's revised multiple ownership rules.

⁶ Public Notice, Report No. 2599, released March 10, 2003

⁷ DA 04-547, released March 5, 2004, DA 04-582, released March 5, 2004, DA 04-606, released March 12, 2004 and DA 04-607, released March 12, 2004

The Commission accepted the amended proposal “in view of this unforeseen circumstance.”⁸ The petitioner subsequently withdrew the Trenton counterproposal when the Third Circuit stayed the effectiveness of those rules.⁹ In seeking the withdrawal, the petitioner there recognized that its request was a “most extraordinary one.”¹⁰

11. No party stood to be prejudiced by the reinstatement in either the *Wickenburg and Salome* proceeding or in the *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* proceeding. Here, multiple parties were prejudiced by the filing of the Kent counterproposal and multiple parties stand to be prejudiced by the reinstatement of the Kent proposal. The Commission has repeatedly declined to accept attempts to cure procedural defects in allotment proceedings where other parties stand to be prejudiced by such action.¹¹ The Commission should apply that policy here and deny Joint Parties’ reinstatement request should be denied given the extreme prejudice that will be worked on the parties in this proceeding.

12. This proceeding perfectly illustrates why the Commission should rescind its *Taccoa Policy*,¹² and establish a policy prohibiting rulemaking proponents from counterproposing their own proposals. The existing policy, even when limited to “unforeseen circumstances,” lends itself only to the type of procedural posturing and mischief present in this proceeding.

13. Furthermore, rescission of the *Taccoa Policy* would be consistent with the Commission’s recent rescission of its policy permitting the Media Bureau to allot new “backfill”

⁸ *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 at n 3

⁹ *Id*

¹⁰ “Request to Withdraw Uncontested Counterproposal and Reinstate Original Proposal,” MM Docket No. 03-132, submitted September 25, 2003

¹¹ See *Lincoln, Osage Beach, Steelville, and Warsaw, Missouri*, FCC 02-35 (2002) and cases cited therein

¹² *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (Allocations Branch 2001)

FM allotments to “preserve” a community’s sole local transmission service.¹³ The Commission rescinded that policy because it was an “uncertain time consuming process” that led to “intractable spectrum entanglements” which is exactly the situation in this case.

14. As the Commission discussed in *Taccoa*, permitting rulemaking proponents to counterpropose their proposals makes “it necessary for the staff to process two inconsistent proposals from the same party in a single rulemaking proceeding. This appears to be an unnecessary expenditure of staff resources without any offsetting public interest benefit and is not conducive to the efficient transaction of Commission business.”¹⁴ Here though, the staff will be required to process not two, but three inconsistent proposals. The burden is not merely doubled but tripled.

III. JOINT PARTIES FAILED TO SUBMIT AN APPROPRIATE EXPLANATION TO WARRANT REINSTATEMENT OF THE ORIGINAL PROPOSAL

15. As described in Mercer Island’s initial reply comments in this proceeding, Joint Parties failed to adequately justify acceptance of their counterproposal. Joint Parties likewise fail to provide any justification for the withdrawal of that proposal and reinstatement of the original proposal. Unlike the parties in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* who were essentially forced to abandon their proposed move to Oak Grove, Kentucky because of the Commission’s adoption of new multiple ownership rules and who then sought reinstatement of that proposal when those rules were stayed, nothing compelled the Joint Parties to seek out an alternative community by way of a counterproposal and nothing has changed so as to require reinstatement of the original proposal.

¹³ See *Refugio, Texas*, 18 FCC Rcd 2291, para 15 (2003)

¹⁴ *Taccoa, Georgia*, 16 FCC Rcd at para 5

16. Joint Parties have not provided any reason, much less a compelling one, supporting reinstatement of the original proposal. To the contrary, the Joint Parties “Withdrawal of Counterproposal” establishes that nothing compelled the withdrawal of the counterproposal other than a **voluntary decision** to abandon the counterproposal. Therein, Joint Parties specifically state that: “The Joint Parties have decided that they will not pursue the Counterproposal submitted in response to the *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002), in this proceeding.”¹⁵

17. While the Joint Parties also state that “Saga no longer consents to the substitution of Channel 281C for 282C at Bellingham,” that too appears to be a voluntary decision un compelled by anything other than a desire to avoid having to reveal the nature, terms and conditions of the agreements underlying Saga’s earlier consent to the aforementioned substitution. Furthermore, Joint Parties, neither collectively nor individually, have represented to the Commission that the underlying agreements have been terminated. To the contrary, Saga’s “Response to Order to Show Cause” refers to these agreements in the present tense, stating they are “in effect,” suggesting that the Joint Parties withdrawal request is merely a tactical one having no bearing on the ultimate objective

18 Given that the withdrawal is a voluntary one, made solely to satisfy their own business needs and interests, the Commission should grant Joint Parties withdrawal request but deny the reinstatement request.¹⁶ Just as a private business decision will not warrant a grant of a

¹⁵ Withdrawal at para 1

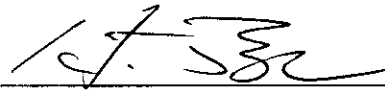
¹⁶ As discussed previously (*supra* para 7) the Commission should find that no proposal exists that may be reinstated

rule waiver,¹⁷ the Joint Parties business decision to withdraw the counterproposal does not justify reinstatement of the original proposal.

Wherefore, the premises considered, Mercer Island School District respectfully requests that the Commission grant Joint Parties withdrawal request, deny the reinstatement request, deny Counterpetitioners proposal and grant the proposed Class A Channel 283 allocation at Mercer Island for KMIH as proposed in this proceeding.

Respectfully submitted,

MERCER ISLAND SCHOOL DISTRICT

By: 

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Its Counsel

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May 24, 2004

¹⁷ See *Styles Interactive, Inc Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline*, FCC 97-390 at para 8 (1997)

CERTIFICATE OF SERVICE

I, Howard J. Barr, do hereby certify that I have on this 24th day of May, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing "Statement Regarding Withdrawal of Counterproposal" to the following:

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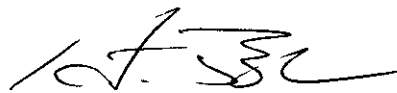
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A handwritten signature in black ink, appearing to read 'H. J. Barr', written over a horizontal line.

Howard J. Barr

• Hand Delivered